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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No. **363**

MARTHA PRYOR, OSAGE ALLOTTEE No. 99, *Petitioner,*

v.

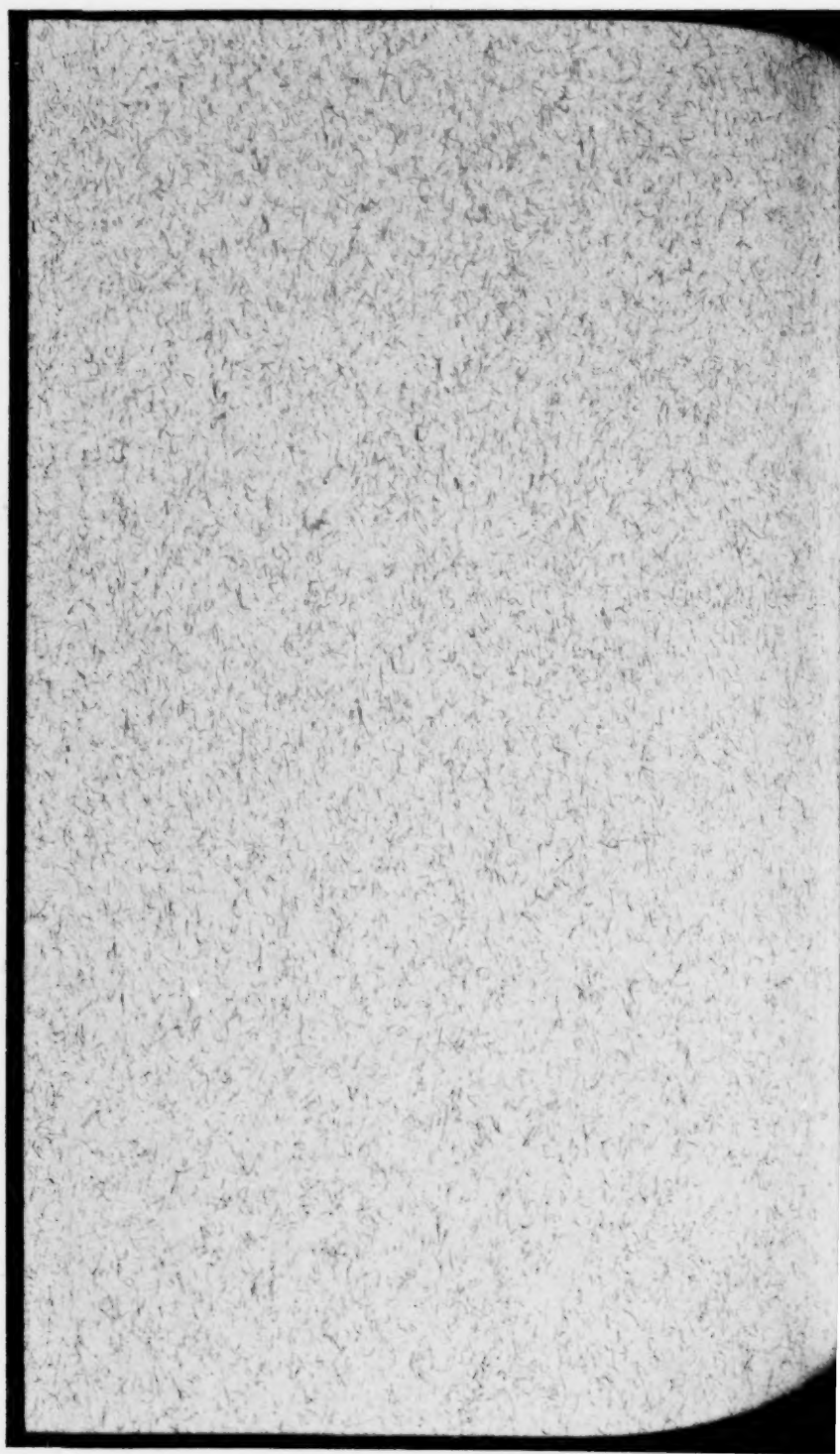
SUSIE PRYOR CRAFT, ALFRED ANTWINE PRYOR, MARY MARTHA
PRYOR, IRENE MARCELLE PRYOR, MINNIE OLIVIA MC-
CLURE PRYOR AND JULIA ADDIE PRYOR, *Respondents.*

**PETITION FOR WRIT OF CERTIORARI AND BRIEF
IN SUPPORT THEREOF.**

✓ WESLEY E. DISNEY,
Southern Building,
Washington, D. C.

✓ WILLIAM S. HAMILTON
and

MATTHEW J. KANE,
Pawhuska, Oklahoma,
Attorneys for Petitioner.



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No. .

MARTHA PRYOR, OSAGE ALLOTTEE No. 99, *Petitioner*,

v.

SUSIE PRYOR CRAFT, ALFRED ANTWINE PRYOR, MARY MARTHA
PRYOR, IRENE MARCELLE PRYOR, MINNIE OLIVIA MC-
CLURE PRYOR AND JULIA ADDIE PRYOR, *Respondents*.

**PETITION FOR WRIT OF CERTIORARI TO THE SU-
PREME COURT OF THE STATE OF OKLAHOMA.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioner, Martha Pryor, Osage Allottee No. 99,
prays that a writ of certiorari issue to review a judgment
of the Supreme Court of the State of Oklahoma, entered
in the above case on February 18, 1947.

Opinions Below.

Opinion of the County Court, Osage County, Oklahoma,
entered July 22, 1941 (R. 23). Opinion of the District

Court, Osage County, Oklahoma, filed February 18, 1942 (R. 50). The opinion of the Supreme Court of the State of Oklahoma, filed February 18, 1947 (R. 58) has not yet been officially reported.

Statement.

The controversy presented by this petition involves a major question and a subordinate question. The major question is whether the property of a deceased minor full blood member of the Osage Tribe of Indians, who had never been married and who had no issue, descends to his mother, his sole surviving parent, under the provisions of Section 6 of the Act of Congress of June 28, 1906 (34 Stat. L. 539), which reads as follows:

“That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or the State in which said reservation may be herein-after incorporated *except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.*” (Emphasis ours)

or descends to his brothers and sisters and the children of a deceased brother under Subdivision 7 of Section 213 of Title 84 O. S. 1941, which, with the introductory sentence, reads as follows:

“When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:

“Seventh. If the decedent leave several children or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.”

The subordinate question is whether real estate acquired by the decedent through a partition suit in a court of general jurisdiction came by purchase or by inheritance.

Woodrow Pryor, an unallotted full blood member of the Osage Tribe of Indians, a citizen and resident of Osage County, Oklahoma, died intestate on October 20, 1938. He was 19 years of age, had never been married and left no issue. His father, Antwine Pryor, full blood Osage Allottee No. 569, had died intestate on March 16, 1933.

Woodrow Pryor, the decedent, left surviving him as his next of kin, his mother, Martha Pryor, full blood Osage Allottee No. 99 your petitioner; and Susie Pryor Craft, sister by the half-blood, daughter of the deceased father, Antwine Pryor; Alfred Antwine Pryor, Mary Martha Pryor and Irene Marcelle Pryor, children of Alfred (Buster) Pryor, a deceased brother; and Elmer Pryor, brother, who has since died leaving as his heirs his wife, Minnie Olivia McClure Pryor, and a daughter, Julia Addie Pryor. They are the respondents herein.

The property which the decedent owned at the time of his death consisted of a fractional interest in the Osage mineral estate, commonly called Osage headright, money and securities, and 320 acres of land. The headright and the securities and a large portion of the money had been distributed to him by the decree of distribution in probate proceedings on his father's estate. The land was a part of a larger acreage distributed jointly to the said Woodrow Pryor and other heirs of the father. Later this land had been partitioned in the District Court of Osage County, Oklahoma, a court of general jurisdiction, and in that partition proceedings the 320 acres were set over to and deeded to the decedent after there had been paid from the decedent's funds more than \$1,100.00 in money to equalize the distribution in the partition suit. At his death a part of the money in his estate consisted of accumulations to his estate from rents on his real estate, quarterly annuity payments on his interest in an Osage

headright, dividends on his securities and interest on his trust funds. All of his property was and is in the custody and under the supervision of the United States, acting through the Osage Indian Agency, a division of the Interior Department.

In the probate proceedings in the county court the federal question sought to be reviewed here was raised by this petitioner in her petition to be determined the sole and only heir of the decedent. In that petition she said, "She further shows to the court that all of the property * * * with which the said Woodrow Pryor died seized and possessed, came from the tribal community property of the Osage Tribe of Indians; that the said property of said decedent passes under the law of descent and distribution of the United States of America as outlined and provided in the allotment Act of June 28, 1906 (34 Stat. L. 539); that under the applicable provisions of said law * * * all the land, moneys and mineral interests belonging to him at the time of his death passed to and became the property of your petitioner, his mother, the only parent surviving him." (R. 21)

The respondents contended that all the property was inherited by them under the provisions of Subdivision 7 of Section 213; Title 84 O. S. 1941. Typical of their contentions is the following quotation, to wit: "That all of the property of which the said Woodrow Pryor died seized and possessed descended under subsection 7 of section 213 of title 84 Oklahoma Statutes Annotated to his brothers and sisters or their children by right of representation." (R. 15,

~~w. C. D. 17, 18, 20)~~

The County Court in its judgment and decree denied the petition of your petitioner, and ordered all of the property distributed under the state statute, *supra*. In the judgment and decree it was by the County Court ruled "It is the further order, judgment and decree of the court * * * That the property, funds and income descended from or grew out of the inheritance from his father, Antwine Pryor, and that the estate descends according to the provisions of Section

1617, Subsection 7 of the Compiled Oklahoma Statutes of 1931 (now 84 O. S. 1941 Sec. 213, Subsection 7). That the mother, Martha Pryor, does not and is not, entitled to inherit any part or portion of the estate, but the same descends to the following heirs" * * * sister, children of deceased brother, and estate of other brother, each one-third. (R. 29)

The petitioner appealed to the District Court. In her notice of appeal petitioner said, "The grounds of said appeal are on questions of both law and fact." (R. 1) The case was tried *de novo* in that court. (R. 32-50)

The petition, *supra*, of this petitioner to be determined the sole and only heir of the decedent was a part of the transcript from the county court to the district court and the questions sought to be reviewed here were raised in the district court by the said petition, pertinent quotation from which is given, *supra*. In the trial in the district court a large portion of the evidence was by stipulation. (R. 35-38) In addition, documentary evidence was introduced to show that during the time the Interior Department found and decreed heirs of deceased members of the Osage Tribe, that Department held and ruled that the surviving parent inherited all the property both his original allotment and property inherited from a deceased parent. (R. 40-41)

The respondents introduced in evidence an opinion by the Solicitor of the Interior Department dated June 19, 1928, sixteen years after Congress had enacted that the property of deceased members of the Osage Tribe "shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma." Section 3, Act of April 18, 1912 (37 Stat. L. 86). In that opinion the Solicitor gave as his interpretation that brothers and sisters inherited, to the exclusion of the surviving parent, property which had conditionally passed to a minor heir from the deceased parent. (R. 45-50)

The district court in its judgment and decree denied the petition of your petitioner and ordered all the property dis-

tributed under the Subdivision 7 of the state statute, *supra*. In the judgment and decree, the district court ruled "That all the property of which the deceased Woodrow Pryor died seized and possessed had come to him from the estate of his deceased father, Antwine Pryor, or was accumulation from the headright and property which came to him * * * from his father * * * and that all of the said property descended under and in accordance with the provisions of Sub-division 7 of Section 213 of Title 84 of Oklahoma Statutes of 1941, and that the mother, Martha Pryor, does not inherit any portion of said estate * * *. That the sole and only heirs of said Woodrow Pryor * * * are" the sister, and children of deceased brother and estate of another deceased brother. (R. 52-53)

Petitioner filed motion for new trial in which she asserted,

"That the judgment of the court is contrary to the evidence.

"That the judgment of the court is contrary to law." (R. 54)

The motion for new trial was overruled and denied. Petitioner asked and was granted her exceptions. (R. 55)

On appeal in the Oklahoma Supreme Court, the petitioner, in her petition in error challenged the judgment of the trial court on the grounds,

"The the judgment of the trial court is contrary to the evidence.

"That the judgment of the trial court in contrary to law." (R. 56-57)

The Oklahoma Supreme Court filed a majority opinion adverse to the contentions and rights of the petitioner under Section 6 of the Act of June 28, 1906 (34 Stat. L. 539) on most of the property in the estate. That court followed the view of the district court as to the property originally inherited by Woodrow Pryor from his father, holding that

this portion of the property descended under the state law to the sister, and the children of the deceased brother, and the estate of the other brother. That court held that the accumulations from rents, dividends on securities, interest on trust funds, and quarterly annuity payments on the interest in the Osage headright, descended to the mother, either under Section 6 of the Act of June 28, 1906 (34 Stat. L. 539), or under another subdivision of the state statute. That court held that title of the 320 acres of land which had been set over to and deeded to the decedent in the partition suit vested in the decedent by inheritance from the father and not by purchase, according to the rule announced by the Circuit Court of Appeals of the 10th Circuit in *United States v. Hale*, 51 Fed. (2d) 629.

In the majority opinion, the Oklahoma Supreme Court classified the property that came by descent from the father as ancestral property, and classified the accumulations as property originally acquired by the decedent. And it erroneously attributed to the Congress of the United States an intention to divide the lands, moneys and mineral interests of members of the Osage Tribe into two classes—ancestral property and originally acquired property. In the majority opinion the court in paragraphs 3 and 4 of the syllabus summarized its holding as follows:

“Osage headrights, building and loan stock and other securities, land received by partition of ancestral land though a part thereof is paid for out of ancestral funds, and moneys received, directly and immediately from the decedent, constitute ancestral estate. However, accruals or accumulations thereto, such as rents, profits or interest thereon, constitute acquisitions by the heir by reason of his ownership and are not ancestral in character.

“Where a minor full-blood Osage Indian, unmarried and without issue, dies intestate, his ancestral estate descends under subdivision 7, sec. 213, 84 O. S. 1941, which relates only to ancestral property, to his brothers and sisters or their issue, and that portion of his estate that is not ancestral descends to his surviv-

ing parents or parent under section 6 of the Osage Allotment Act or subdivision 2, 84 O. S. 1941, as amended in 1909."

v.c.p. 59 (R. 55-59) By so holding the court in reality ruled in favor of a state statute repugnant to a statute of the United States, and denied to this petitioner a right and title claimed under a statute of the United States.

In a dissenting opinion by one member of the court, in which another member concurred, it was held that "Congress in making the exception [contained in Section 6 of the Act of June 28, 1906 (34 Stat. L. 539)] co-extensive in operation with the whole Oklahoma law of succession designed to overthrow the doctrine of ancestral estates as reflected in subdivision 7 and in denial thereof substitute therefor a law which recognizes that the source of the title is tribal rather than individual and the parents to be mere conduits so long as the descent is cast from restricted members." and further that "Subdivision 7, Section 213, Title 84 O. S. 1941 is not operative in the instant case and the estate passed under section 6 of the Osage Allotment Act (34 St. L. 539)."

Within time granted by the Oklahoma Supreme Court under its rules, petitioner filed petition for rehearing. In that petition this petitioner raised the questions herein sought to be reviewed. Among other things she stated that the majority opinion "is based upon the application and meaning of Section 6 of the Osage Allotment Act of June 28, 1906 (34 Stat. L. 539), by which the Oklahoma law of descent and distribution, except as therein modified, was adopted as the law of the United States for the estates of deceased members of the Osage Tribe. Said opinion erroneously interprets and applies said law * * * and in effect uses a Subdivision of a Section of the law of descent and distribution of the State of Oklahoma as superior to the law of descent and distribution of the United States.

"That said opinion is in hopeless conflict with the opinion and decision of this court in the case of *Mosier v. Jones*, 108

Okla. 228, 235 Pac. 199. And said opinion is in hopeless conflict with the opinion of the Circuit Court of Appeals of the Tenth Circuit in the case of *United States v. Hale*, 51 Fed. (2d) 629." (R. 78)

This Petition for rehearing was denied April 8, 1947. (R. 103)

Within the 5 days provided by the rules of the Oklahoma Supreme Court and to wit on April 12, 1947, petitioner filed application for permission to file second petition for rehearing. (R. 103) On June 23, 1947, the Oklahoma Supreme Court granted petitioner's application to file second petition for rehearing, and ordered that the submitted second petition for rehearing be filed. It was filed, and the court considered it, and after consideration thereof, ordered that it should be denied. (R. 106)

In the second petition for rehearing this petitioner stated to the court that it "erred in interpreting Section 6 of the Osage Allotment Act of June 28, 1906 (34 Stat. L. 539) by holding that the proviso of the said Section 6 applied only to Subdivision 2 of Section 6895 of Statutes of Oklahoma 1903, when as a matter of fact, it applied to all of the subdivisions of that section." And

"This court further erred in holding that Subdivision 7 of 84 O. S. 1941, Section 213, stands in *pari materia* with Section 6 of the Osage Allotment Act, when as a matter of fact, there exists a conflict between the said Subdivision 7 and the rule of descent set forth in the proviso of Section 6 of the Allotment Act." And that the court erred in not holding pursuant to rule announced in *United States v. Hale*, 10th Cir., 51 Fed. (2d) 629, that real estate, an interest in which had been inherited from the deceased father, and then entire title acquired in a partition suit, passed to the surviving mother under Section 6 of the Act of June 28, 1906 (34 Stat. L. 539) instead of holding that it passed to his sister, and to the children of a deceased brother, and the estate of another deceased brother under Subdivision 7 of Section 213, Title 84 O. S. 1941. (R. 104-105)

One June 24, 1947, the Oklahoma Supreme Court entered its order denying the second petition for rehearing. (R. 106)

The Oklahoma Supreme Court is the highest court in the state in which a decision can be had on the questions involved.

Jurisdiction.

This court has jurisdiction under Section 237 of the Judicial Code, 28 U. S. C. A. Sec. 344, to review the judgment and decree of the Supreme Court of Oklahoma. The decedent, Woodrow Pryor, and his deceased father were full blood members of the Osage Tribe of Indians. The petitioner and the respondents, with one possible exception, are members of the Osage Tribe of Indians, most of them full blood members. The members of that tribe are wards of the United States. *United States v. Ramsey*, 271 U. S. 467, 70 L. ed. 1039. All the property is in the custody and under the supervision of the United States through the Osage Indian Agency, a division of the Interior Department. Section 5 of the Act of Congress of March 2, 1929 (45 Stat. L. 1478). Congress retained control of the Osage Indians and their property. The property of the decedent passes by virtue of a law of the United States—Section 6, Act of June 28, 1906 (34 Stat. L. 539). The majority opinion and the judgment of the Oklahoma Supreme Court cast the descent of the property under a state statute—Subdivision 7 of Section 213, Title 84 O. S. 1941 (not adopted as a part of the United States law of descent), which is repugnant to this act of Congress.

The Questions Presented.

The determination of this controversy involves the following questions:

Do the lands, moneys and mineral interests of a member of the Osage Tribe of Indians inherited by him from a deceased parent descend to his surviving parent under the

provisions of Section 6 of the Act of Congress of June 28, 1906 (34 Stat. L. 539), *supra*, or do they descend to his brothers and sisters and the issue of a deceased brother under the repugnant provisions of the Oklahoma statute, Subdivision 7 of Section 213, Title 84 O. S. 1941?

Is land which has been set over to and deeded to a member of the Osage Tribe of Indians in a partition suit conducted in a court of general jurisdiction under authority of Section 6 of the Act of Congress of April 18, 1912 (37 Stat. L. 86), a title by inheritance or a title by purchase, as held in *United States v. Hale* (10th Circ.), 51 Fed. (2d) 629.

Reasons Why Writ Should be Granted.

1. Osage County is the largest county in the state of Oklahoma. It contains 1,467,520 acres of land. All of this land, except approximately 4,000 acres set aside for five townsites, three Indian villages, some cemeteries and schools, was allotted to the 2,229 original members of the tribe, each receiving approximately 665 acres. The oil, gas, coal and other minerals were reserved as the community property of the tribe by the Original Allotment Act and amendments until January 1, 1984 and may be extended further by Congress. Act, June 28, 1906 (34 Stat. L. 539), Act of March 3, 1921 (41 Stat. L. 1249), Act of June 24, 1938 (52 Stat. L. 1034). The reserved oil, gas, coal and other minerals constitute the Osage mineral estate, individual interests in which are referred to as Osage headrights.

1A. Many of the original allottees have died and their lands, moneys and mineral interests have descended to their heirs. This is continually happening—the lands, moneys and mineral interests passing to the second, third and fourth generations of heirs. Consequently the questions involved herein are being constantly presented. There will be uncertainty until the questions herein presented are settled by this court of last resort.

2. The decision of the Oklahoma Supreme Court in this case against petitioner casting the descent of the property

of the decedent to the brothers and sisters and children of a deceased brother is based on the provisions of a state statute, Subdivision 7 of Section 213, 84 O. S. 1941, which statute is repugnant to the Act of Congress of June 28, 1906 (34 Stat. L. 539). And the decision of that court denies to your petitioner a right and title to that property claimed under a statute of the United States, being Section 6 of the Act of June 28, 1906, and which, as petitioner claims, entitles her to invoke jurisdiction of this court by writ of certiorari to review the final judgment of the Oklahoma Supreme Court denying such right and title.

3. The decision of the Oklahoma Supreme Court in this case is not only in direct conflict with Section 6 of the Act of June 28, 1906 (34 Stat. L. 539), but is contrary to the holding of this court on analogous acts in laws relating to members of the Creek and Seminole Tribes of Indians in the case of *Washington v. Miller*, 235 U. S. 422, 59 L. ed. 295; and in the case of *Grayson v. Harris*, 267 U. S. 352, 69 L. ed. 652; and in the case of *Marlin v. Lewallen*, 276 U. S. 59, 72 L. ed. 467; and in the case of *Campbell v. Wadsworth*, 248 U. S. 169, 63 L. ed. 192.

4. The decision of the Oklahoma Supreme Court in this case is also in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit in the case of *United States v. Hale*, 51 Fed. (2d) 629, a case construing the identical Section 6 of the Act of June 28, 1906 (34 Stat. L. 539) and holding that the title of the property of a deceased minor member of the Osage Tribe vested in the father, the sole surviving parent, under the terms of this section.

5. The decision of the Oklahoma Supreme Court in this case is also contrary to the decision of that court in the case of *Mosier v. Jones*, 109 Okla. 228, 235 Pac. 199, a case decided exclusively on the said Section 6 of the Act of June 28, 1906 (34 Stat. L. 539) and correctly holding this section superior and controlling over another Subdivision of Section 213, Title 84 O. S. 1941.

6. The decision of the Oklahoma Supreme Court in this case is contrary to the interpretation of and decisions under said Section 6 of the Act of June 28, 1906 (53 Stat. L. 539) by the Secretary of the Interior during the period of time from the date of the Act until April 18, 1912 (37 Stat. L. 86) conferring jurisdiction on the county courts of Oklahoma. During this period the Secretary found and decreed the heirs of deceased members of the Osage Tribe giving the property to the surviving parent as shown by the record. (R. 38-41)

7. There has never been a decision of this court on the questions involved. We submit that it is important for this court to determine the question in view of the conflict of the decision in this case and the decision of the Circuit Court of Appeal of the 10th Circuit in the case of the *United States v. Hale, supra*, and the prior decision of the Oklahoma Supreme Court in the case of *Mosier v. Jones, supra*, and the conflict with the decisions of this court in the cases of *Washington v. Miller* and *Grayson v. Harris* and *Marlin v. Lewallen* and *Campbell v. Wadsworth, supra*, and the contemporary decisions of the Secretary of the Interior.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Supreme Court of the State of Oklahoma, commanding said court to certify to the clerk of this court a full and complete transcript of the record and proceedings of the Supreme Court of the State of Oklahoma in the case numbered and entitled on its docket, 31066, *Martha Pryor, Plaintiff in Error, v. Susie Pryor Craft, Antwine Pryor, Mary Martha Pryor, Irene Marcelle Pryor and the Estate or Heirs of Elmer Pryor, Deceased, Defendants in Error*, to the end that this cause may be reviewed and determined by this court as provided by paragraph B of Section 237 of the Judicial Code, and that the judgment herein of the said Supreme Court of the State of Oklahoma be reversed by

this court and the cause remanded to that court with directions to reverse its final judgment entered in this cause, and to vacate such final judgment, and for such other relief as this court may deem proper.

Respectfully submitted,

.....
 WESLEY E. DISNEY,
 Southern Building,
 Washington, D. C.

WILLIAM S. HAMILTON
 and
 MATTHEW J. KANE,
 Pawhuska, Oklahoma,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

The petitioner invokes the jurisdiction of this court under Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. L. 937; Title 28 U. S. C. A., Sec. 344) to review the final judgment of the Supreme Court of the State of Oklahoma entered on June 24, 1947, affirming in part a final decree of the District Court of Osage County, Oklahoma, a court of general jurisdiction, which final judgment affirmed the judgment and decree of the County Court of Osage County, Oklahoma. Under the judgment and decree of the Supreme Court of the State of Oklahoma, that portion of the lands, moneys and mineral interests of Woodrow Pryor, a deceased minor member of the Osage Tribe of Indians, which he had inherited from his father, Antwine Pryor, was adjudged to descend and be distributed to his sister and the children of a deceased brother and the estate of another deceased brother, under a state statute which is repugnant to a statute of Congress providing that such lands, moneys and mineral interests should descend to his mother, his surviving parent. The order of the Oklahoma Supreme Court denying the second petition for rehearing was entered on June 24, 1947. (R. 106)

Petition for certiorari is presented within three months from and after the denial of the second petition for rehearing.

Jurisdiction to grant the writ of certiorari is based upon that portion of Section 237B of the Judicial Code, as follows:

“It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered * * * by the highest court of a state * * * where is drawn in question the validity of a statute of any state on the

ground of its being repugnant to the * * * laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under * * * any * * * statute of * * * the United States."

This court has upheld its jurisdiction to grant petition for writ of certiorari where analogous questions were involved in:

Longast v. Langford, 274 U. S. 499, 71 L. ed. 1170;
Marlin v. Lewallen, 276 U. S. 58, 72 L. ed. 467.

Statement of the Case.

The petition for writ of certiorari presents a major question and a subordinate question. The major question is whether the property of a deceased minor full blood member of the Osage Tribe of Indians, who had never been married and who had no issue, descends to his mother, his sole surviving parent, under the provisions of Section 6, Act of Congress of June 28, 1906 (34 Stat. L. 539) instead of descending to his sister, and the children of a deceased brother, and the estate of another deceased brother, under Subdivision 7 of Section 213 of Title 84 O. S. 1941.

Section 6 of the above Act of Congress reads,

"That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or the State in which said reservation may be hereinafter incorporated *except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.*" (Emphasis ours)

Subdivision 7 of the state statute with the introductory sentence reads as follows:

"When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:"

“Seventh. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends, in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.”

The minor member of the Osage Tribe of Indians whose estate is involved was Woodrow Pryor, a full blood unallotted member. He had inherited lands, moneys, securities and mineral interests from his deceased father, full blood member of the Osage Tribe. During the lifetime of the deceased minor there had been accumulations thereto from rents, dividends on securities, interest on trust funds and quarterly annuity payments on the interest in the mineral estate, commonly called an Osage headright. He left surviving him as his next of kin the petitioner, Martha Pryor, full blood Osage Allottee No. 99, his mother; a sister by the half blood, daughter of his deceased father; the children of a deceased brother; and he also left another brother who later died.

The County Court of Osage County, Oklahoma, in its final judgment and decree held and ordered that all the property with which he died seized and possessed descended under the Oklahoma state statute, *supra*, to his sister, the children of the deceased brother, and the estate of the other brother, to the exclusion of the mother who claimed under Section 6 of the Act of Congress, *supra*. (R. 23-31)

From this judgment the petitioner appealed to the District Court of Osage County, a court of general jurisdiction having appellate jurisdiction over the decree and judgment of the county court. In trial *de novo* the District Court rendered judgment in all respects affirming the judgment of the county court. (R. 50-54)

On appeal by the petitioner from this judgment of the district court to the Oklahoma Supreme Court, that court in

a majority opinion ruled and ordered that all of the lands, moneys, securities and mineral interests inherited by the deceased minor from his father descended to the sister, and the children of a deceased brother, and the estate of the other deceased brother, under Section 7 of the Oklahoma statute, *supra*, to the exclusion of the mother, who claimed under Section 6 of the Act of Congress, *supra*, in an opinion filed February 18, 1947, reported in Volume 18 Oklahoma Bar Journal, page 342, but not yet officially reported. (R. 58-67)

The petitioner seasonably filed petition for rehearing (R. 75, 77), which petition for rehearing was by that court overruled on April 8, 1947. The petitioner filed application for permission to file second petition for rehearing. The Oklahoma Supreme Court granted the application and gave permission to file the second petition for rehearing. The second petition for rehearing was denied on June 24, 1947 (R. 106), and this constituted the final judgment by the Oklahoma Supreme Court.

Specifications of Errors.

1. The Oklahoma Supreme Court erred as a matter of law in holding and decreeing that the lands, moneys, securities and mineral interests of the decedent, Woodrow Pryor, title of which had vested in him as an heir of his father, descended under Subdivision 7 of Section 213, Title 84 O. S. 1941, a state statute, to his sister, the children of a deceased brother and the estate of another deceased brother, instead, of holding and decreeing that these lands, moneys, securities and mineral interests descended under Section 6 of the Act of Congress of June 28, 1906 (34 Stat. L. 539), a statute of the United States, to his mother, his sole surviving parent.

2. The Oklahoma Supreme Court erred as a matter of law in holding and decreeing that the title of land, an interest in which Woodrow Pryor inherited from his father,

and the entire title of which was set over to and deeded to Woodrow Pryor in a partition suit in a court of general jurisdiction, was a title by inheritance and not a title by purchase.

Summary of Argument.

I.

The major question to be determined by this court is whether the lands, moneys, securities and mineral interests owned by a restricted minor member of the Osage Tribe of Indians inherited by him from a deceased parent, all of said property being in the custody and under the supervision of the United States for the said minor ward, descends on the death of said member, leaving no issue and no husband or wife, to his brothers and sisters and the issue of a deceased brother or sister under Subdivision 7 of Section 213 Title 84 O. S. 1941, instead of descending to his mother, his sole surviving parent, under Section 6 of the Act of June 28, 1906 (34 Stat. L. 539). The Oklahoma Supreme Court held descent under the state statute.

The subordinate question, if necessary to be answered, is this: Did the title of land, an interest in which with other land was inherited by Woodrow Pryor from his father, and all of which land together with other land was later partitioned in the district court, a court of general jurisdiction, and this land was set over to and deeded to the decedent after he had paid a substantial sum of money to equalize values, rest in him as title by inheritance and not a title by purchase? The Oklahoma Supreme Court held the title was by inheritance.

The petitioner respectfully shows that the decision of the Oklahoma Supreme Court is erroneous in that it distributed the property under a state statute which is repugnant to the Act of Congress establishing the law of the United States for descent and distribution of the property of deceased members of the Osage Tribe of Indians.

Section 6 of the Act of June 28, 1906 (34 Stat. L. 539), in adopting some of the law of Oklahoma as the law of descent and distribution for the estates of deceased members of the Osage Tribe, contains an exception as special legislation to the effect that "where the decedent leaves no issue, nor a husband nor wife, * * * (his) lands, moneys and mineral interests must go to the mother and father equally." The construction placed upon this proviso by the Oklahoma Supreme Court nullifies this portion of an Act of Congress and gives to a state statute repugnant thereto superiority.

The construction placed by the Oklahoma Supreme Court on the subordinate question concerning the title of property acquired in a partition suit conducted in a court of general jurisdiction is in conflict with the decision of the Circuit Court of Appeals of the 10th Circuit in the case of *United States v. Hale*, 51 Fed. (2d) 629, construing this same Act of Congress. The decision of the Oklahoma Supreme Court on both questions is erroneous.

II.

The Decision of the Oklahoma Supreme Court is Contrary to Decisions of the Supreme Court of the United States.

The decision of the Oklahoma Supreme Court is contrary to the decision of this court in the case of *Washington v. Miller*, 235 U. S. 422, 59 L. ed. 295. In that case this court reviewed a decision of the Oklahoma Supreme Court on the construction of Section 6 of the Supplemental Creek Agreement of June 30, 1902 (32 Stat. L. 500), by which section it was provided that descent of land and money provided for by the allotment should be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas then in force in Indian Territory "Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation: And provided further, That if there be no person of Creek

citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said Chapter 49." There was a later Act, that of April 28, 1904 (33 Stat. L. 573), which continued and extended all the laws of Arkansas theretofore put in force in the Indian Territory, in their operation so as to embrace all persons and estates in Indian Territory whether Indian, freedman or otherwise.

An enrolled Creek citizen died November 3, 1907, just before statehood for Oklahoma. He left no widow or descendants, but left his father, who was enrolled as a Seminole, and left his mother, who was enrolled as a Creek. The plaintiff claimed title through deed executed to him by the mother. The father was a defendant. The father made two contentions: One was that the proviso of the supplemental agreement did not apply to land after allotment. The other was that the later act of April 28, 1904, repealed the proviso contained in Section 6 of the Supplemental Creek Agreement, *supra*, and therefore, that the father took the property as an heir under the provisions of the Arkansas law. This court reviewed both contentions. With reference to the first contention, this court said that the exception referred to the lands in the Creek Nation. "In that sense they would include the lands as well after allotment as before. The section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe rules of descent applicable to all Creek allotments." In answer to the second contention, this court said that the later act was general; the exception to Section 6 of the supplemental agreement was special legislation and that "No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians, whose affairs were peculiarly within its control."

The decision of the Oklahoma Supreme Court is also contrary to the decision of this court in the case of *Grayson v. Harris*, 267 U. S. 352, 69 L. ed. 652. In that case this court reviewed a decision of the Oklahoma Supreme Court. The same Section 6 of the Supplemental Creek Agreement of June 30, 1902 (32 Stat. L. 500) was under consideration. The property passing by descent in that case was owned not by the original allottee, but by the heir of the original allottee. The Oklahoma Supreme Court held in that case as in the case at bar that the exception did not apply to the estate of an heir of the original allottee; therefore, that the title of the property passed at the date of the death of the decedent in 1907, before statehood for Oklahoma, under the law of Arkansas and not under the provisions of the federal statute. This court rejected that holding and reversed the opinion of the Oklahoma Supreme Court. In the syllabus the ruling of this court on the immediate subject is stated in the following language:

“The proviso of Section 6 of the Act of 1902, relating to descent and distribution of property of Creek Indians, that only citizens of the Creek Nation and their Creek descendants shall inherit land of the Creek Nation, is not limited to the heirs of the first allottees, but applies to all descendants and distributees.”

The decision of the Oklahoma Supreme Court is contrary to the decision of this court in the case of *Marlin v. Lewallen*, 267 U. S. 58, 72 L. ed. 467. In that case this court reviewed a decision of the Oklahoma Supreme Court construing again Section 6 of the Supplemental Creek Agreement and the Act of April 24, 1924. In that case a Creek citizen died intestate November 24, 1904, seized of the land involved. She was survived by a non-Creek husband and by children who were Creek citizens. The husband contended that he was entitled to an estate by curtesy as provided by Chapter 20 of Mansfield's Digest of the laws of Arkansas. His contention was that under the broad language of the Act of April 28, 1904 (33 Stat. L. 573) con-

tinuing and extending all the laws of Arkansas in Indian Territory so as to embrace all persons and estates whether Indian, freedman or otherwise, subjected the lands of the Creeks to the Arkansas law of curtesy and modified the Supplemental Creek Agreement accordingly. The Oklahoma Supreme Court adopted this contention and decided the case accordingly. This court reversed the Oklahoma Supreme Court. In doing so, this court said, "We are of a different opinion. The provision was couched in general terms, did not refer to the agreements, did not mention curtesy or the Creek lands, and contained no repealing clause. No doubt it was intended to extend the operation of the Arkansas laws in various ways; but it fell far short of manifesting a purpose to make them effective as against special laws enacted by Congress for particular Indians, such as the agreement with the Creeks."

The decision of the Oklahoma Supreme Court is contrary to the decision of this court in the case of *Campbell v. Wadsworth*, 248 U. S. 169, 63 L. ed. 192. In that case this court reviewed a decision of the Oklahoma Supreme Court in which that court had construed the second paragraph of a treaty with the Seminole Tribe of Indians, ratified by Act of Congress of June 2, 1900 (31 Stat. L. 250). There was contained in that act language providing that "The lands, money and other property to which he (a Seminole citizen dying after December 31, 1899) would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas."

A Seminole citizen died July 4, 1901. He left surviving him a wife and two daughters who were citizens of the Creek Nation. He also left surviving him a relative by the name of Lucy Wildcat, who was an enrolled Seminole citizen. The Oklahoma Supreme Court held that by an elastic interpretation of the above quoted portion of the act, the daughters should be decreed to be heirs and inherit the land in question, subject to the dower interest of their mother,

although they were enrolled as Creek citizens and could not be enrolled in two different tribes. This court reversed the Oklahoma Supreme Court saying, "All statutes of descent and distribution are arbitrary expressions of the purpose of the lawmaking power, and that the provisions of such a statute do not happen to meet the notions of justice of a court is not sufficient reason for indulging in an interpretation which modifies their plain and unambiguous terms. Especially is this true of these Indian statutes, which are a progressive development, embodying concessions to tribal custom and tradition necessary to be made in order to accomplish a practical, though perhaps not an ideal, dissolution of the tribal relation and distribution of the tribal property."

The decision of the Oklahoma Supreme Court in the majority opinion as clearly denies the right and title of the petitioner under the exception contained in Section 6 of the Act of Congress of June 28, 1906 (34 Stat. L. 539) as did the decisions of the Oklahoma Supreme Court deny rights and titles arising under the Creek and Seminole laws in the cases next preceding.

III.

The Decision of the Oklahoma Supreme Court is in Conflict With a Decision of the Circuit Court of Appeals of the 10th Circuit.

The exact federal question involved herein was before the Circuit Court of Appeals of the 10th Circuit in the case of *United States v. Hale*, 51 Fed. (2d) 629. In that case the title of a quarter section of land in Osage County, Oklahoma, was involved. It had been allotted to a minor allottee, who died unmarried and without issue. The court held that title passed to the father and mother equally under Section 6 of the Act of Congress of June 28, 1906 (34 Stat. L. 539). Then the mother died, and her one-half interest passed to her husband and two minor children, a brother

and sister of the deceased child, share and share alike. Then through a partition suit involving that quarter section and other land the title of the quarter section was vested in these two minor Osage children, each owning one-half interest therein. These minors were Charles Bigheart and Pearl Bigheart. Then the minor child, Charles Bigheart, died, leaving no wife and without issue. He left as his next of kin his father, George Bigheart, and the minor sister, Pearl Bigheart. George Bigheart, the father, executed a deed to Hale conveying whatever interest in the quarter section he inherited from Charles Bigheart. In the suit the United States contended that Pearl Bigheart, the minor sister, inherited this one-half interest from her minor brother, Charles Bigheart, under Subdivision 7 of Section 213, Title 84 O. S. 1941 (as now cited). Hale contended that George Bigheart, the father, inherited this one-half interest from the minor son as the sole surviving parent under the exception embodied in Section 6 of the Act of June 28, 1906 (34 Stat. L. 539). The subordinate question as to whether the title to his one-half interest came to Charles Bigheart from his mother by inheritance or by purchase through the partition suit was in that case also. The court first decided that Charles Bigheart's title came by purchase through the partition suit. The court rejected the contention that the minor sister inherited from the deceased minor brother under Subdivision 7 of Section 213 of the state law, but on the contrary, the court held that the title "vested in George Bigheart as his father and heir, under the terms of Section 6 of the Allotment Act (34 Stat. L. 539, 545), and not under the state law." It will thus be noted that the decision of the Oklahoma Supreme Court in the case at bar is in conflict with the decision in the United States-Hale case, *supra*, on both the major question and also the subordinate question presented herein.

IV.

**The Decision of the Oklahoma Supreme Court is in Conflict
With Former Holding of That Court.**

The Oklahoma Supreme Court in the majority opinion refers to one certain sentence in Subdivision 2 of Section 6895 Statutes of Oklahoma 1903, the main section on descent and distribution in force at the time the Congress passed the Osage Allotment Act of June 28, 1906 (34 Stat. L. 539). The court then refers to an amendment of this act in 1909 (Session Acts 1909, page 548). That court seems to be of the opinion that when the Legislature amended Subdivision 2 of the state act, *supra*, the exception contained in Section 6 of the Act of June 28, 1906 (34 Stat. L. 539) had no further field in which to operate. Then the court makes the statement that Subdivision 7 has remained the same through all the years. In other words, that court in effect held that a statute enacted in 1909 by the Legislature of the State of Oklahoma superseded the Act of Congress of June 28, 1906. The same act of the Oklahoma Legislature in 1909 amended Subdivision 3 of Section 5895 of the Statutes of Oklahoma 1903, changing its language in several particulars and among other things, providing "if the deceased, being a minor, left no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor." In the case of *Mosier v. Jones*, 109 Okla. 228, 235 Pac. 199, the Oklahoma Supreme Court reversed a district court judgment which had given all the property to the parent having had the care of the deceased child. The Supreme Court in reversing held that the statute as amended did not supersede the provisions of Section 6 of the Act of June 28, 1906 (34 Stat. L. 539), but to the contrary, that the federal statute controlled. The court held that the property of the deceased member of the Osage Tribe:

"Descends upon his death according to the laws of descent and distribution of the State of Oklahoma, sub-

ject however to the exception in Section 6 of the Allotment Act of June 28, 1906 (Stat. 539, c. 3572), which provides that, where the deceased leaves no issue, nor husband nor wife, his estate shall go to the father and mother equally."

The decision of the Oklahoma Supreme Court in the case at bar is in conflict with the former decision in the case of *Mosier v. Jones*, *supra*.

V.

The Oklahoma Supreme Court Decision is Based Upon Obiter Dicta.

In the majority opinion the Oklahoma Supreme Court says the applicability of Subdivision 7 of Section 213, Title 84 O. S. 1941, to the estates of deceased Osage Indians has been recognized in the case of *He-ah-to-me v. Hudson*, 121 Okla. 173, 249 Pac. 138, and in the case of *United States v. Hale*, 51 Fed. (2d) 629. As pointed out in the dissenting opinion, neither of these cases gives any authoritative support for this statement.

In the case of *He-ah-to-me v. Hudson*, *supra*, the provisions of Section 6 of the Act of June 28, 1906 (34 Stat. L. 539) were not called to the attention of the court. The only controversy presented to the court was whether one or the other of two different subdivisions of the state statute governed. For that reason the question cannot be deemed to have been considered. "A question not raised by counsel or discussed in the opinion of the court cannot be regarded as decided merely because it existed in the record and might have been raised and considered." *United States v. Mitchell*, 271 U. S. 9, 70 L. ed. 799.

In the case of *United States v. Hale*, 51 Fed. (2d) 629, the court held that the title of the land was by purchase and not by inheritance. Having reached the conclusion that the estate came by purchase, there was no occasion to say what would have happened if it had come by inheritance.

Not being called upon to decide upon this question, the court evidently did not examine critically the case of *He-ah-to-me v. Hudson*, *supra*, but made an obiter dictum statement that the contention based on the state law would be sound if the title had come by inheritance, citing as authority the *He-ah-to-me v. Hudson* case. Being obiter dictum, it constitutes no precedent.

VI.

The Decision of the Oklahoma Supreme Court is Contrary to the Construction of the Congressional Act by the Secretary of the Interior.

When the Act of June 28, 1906 (34 Stat. L. 539) was enacted by Congress, the administration thereof was placed in the Department of Interior. Section 12 of the Act provided:

"That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

Until under Section 3 of the Act of April 18, 1912 (37 Stat. L. 86) jurisdiction of the county courts of Oklahoma was extended to the estates of deceased members of the Osage Tribe, all determinations of heirs were made by the Secretary of the Interior. During that time he was called upon to pass upon the question being presented here. He held that the lands, moneys and mineral interests passed to the surviving parent under Section 6 of the Act and did not pass to the brothers and sisters under the state law. Typical of his holdings is that with reference to the estates of Frank Wood, Osage Allottee No. 730, and Joe Tasso, Osage Allottee No. 312. Under date of December 22, 1911, Samuel Adams, first Assistant Secretary of the Interior, in a letter to the Commissioner of Indian Affairs, rendered decisions on these two cases. From the decision we quote as follows:

"It is clear that under the foregoing section, when the decedent leaves no issue, nor husband nor wife, but leaves both father and mother, the decedent's estate goes to the mother and father equally, and that a tenancy in common is created."

and further,

"If both parents are living, a tenancy in common is created, but if only one parent is then living, the whole estate goes to such one free from any right of inheritance in the heirs of the deceased parent to the half interest which said deceased parent would have received had he been living at the death of the child. It therefore follows that the whole estate goes to the surviving parent in case only one parent survives the child."

and further,

"Applying said Section 6 to the concrete case presented in your letter you are advised as follows: In case of Frank Wood, Osage Allottee No. 730, who died November 20th, 1907, unmarried and without issue, leaving a mother and brother and a half sister and half brother, who has since died, the entire estate goes to the mother. A further question is presented as follows: Does the language of Section 6 'the lands, money and mineral interest therein provided for' apply to Osage estates after they have passed by inheritance from the original owner?"

and further,

"It can make no difference whether the decedent's estate consists of property owned first hand by virtue of the original distribution under the said Osage act or whether it consists of property subsequently acquired by inheritance or otherwise. So long as it is property set apart to the Osages by the Act, it must descend in the manner stated."

and further,

"You submit the case of Wah-she-ho-tsa, Joe Tasso, Allottee No. 312, who died March 25, 1909, leaving a

wife and four children. * * * His estate descends one third to the wife and one sixth to each of the four children. One of these children died, unmarried and without issue, and the distribution of the child's estate presents a question submitted. It is clear under the Osage Act, the entire estate of such child goes to its mother."

(R. 38-42) Other decisions by the Secretary during the time that he had jurisdiction to determine heirs under the act are to the same effect. (R. 42-45) An opinion by the Solicitor of the Department many years after that Department had jurisdiction to administer the Act does not constitute a precedent.

Undoubtedly this Act of Congress, like all general acts relating to the government of Indian Tribes, was the suggestion of the Interior Department, and the construction by that Department is an assistant, if not demonstrative criterion of the meaning and purpose of the Act. *Blanset v. Cardin*, 256 U. S. 319, 65 L. ed. 950.

VII.

The Funds Were Restricted.

The funds of Woodrow Pryor, unallotted Osage Indian of the full blood, were restricted under provisions of Sections 5 of the Act of Congress of March 2, 1929 (45 Stat. L. 1478), the pertinent part of which reads as follows:

"The restrictions concerning the lands and funds of allotted Osage Indians as provided in this Act and all prior acts now in force shall apply to unallotted Osage Indians born since July 1, 1907 or after the passage of this Act and to their heirs of Osage Indian blood."

VIII.**Conclusion.**

Upon the reasons stated and the authorities cited, it is respectfully submitted that the writ of certiorari should issue.

Respectfully submitted,

WESLEY E. DISNEY,
Southern Building,
Washington, D. C.

WILLIAM S. HAMILTON,
and

MATTHEW J. KANE,
Pawhuska, Oklahoma,
Attorneys for Petitioner.

APPENDIX.

Rules of Oklahoma Supreme Court Governing the Filing of Petitions for Rehearing and Second Petitions for Rehearing.

Rule 28. REHEARINGS: Application for a rehearing in any cause, unless otherwise ordered by the Court, shall be made by petition to the Court, signed by counsel, and filed with the Clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing without leave of the Court. The clerk shall not file any such motion or application except by leave of the Court first obtained. No petition for rehearing shall be filed or considered without proof of service.

Rule 29. APPLICATION FOR SECOND PETITION FOR REHEARING: Within five (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and brief in support thereof.